APPENDIX A

Statutes and Regulations Involved

Section 3(a), Selective Training and Service Act of 1940, as amended, 54 Stat. 885 (1940), as amended, 50 U.S.C. App. § 303(a) (1946) provides in part:

> Except as otherwise provided in this Act, every * * * male * * * person residing in the United States who is between the ages of eighteen and forty-five * * * shall be liable for training and service in the land or naval forces of the United States: Provided, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States. * * *

Section 13(c), Immigration Act of 1924, as amended, 43 Stat. 161 (1924), as amended, 8 U.S.C. § 213(c) (1946) provides in part:

> No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a nonquota immigrant * * *, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant * * *, or (3) is not an immigrant as defined in section 203 of this title.

Section 28(c) of the Immigration Act of 1924, as amended October 29, 1945 (43 Stat. 168; 59 Stat. 551; 8 U.S.C. 224 c) provided:

> "The term 'ineligible to citizenship' when used in reference to any individual, includes an individual who is debarred from becoming a citizen of the United

States under sections 703 and 706 of this title, or section 303(a) of Appendix to Title 50, or under any law amendatory of, supplementary to, or in substitution for any such sections. . . ."

Section 315 of the Immigration and Nationality Act effective December 24, 1952 (66 Stat. 242; 8 U.S.C. 1426) provides in part:

"(a) Notwithstanding the provisions of section 405 (b) any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

32 C.F.R. 601.2 [Cum. Supp., 1944 Ed., 6 F.R. 6825; 7 F.R. 10802] provided:

"(c) The term 'citizen or subject of a neutral country' is used to designate any alien except (1) a citizen or subject of a cobelligerent country or (2) an alien enemy.

(d) The term 'cobelligerent country' means any country at war with a country against which the United States has declared war.

(e) The term 'alien enemy' means a citizen or subject of any country who has been or may hereafter be proclaimed by the President to be an alien enemy of the United States."

32 C.F.R. 622.43(b) [Cum. Supp., 1944 Ed.] provided:

"When an alien registrant who is a citizen or subject of a neutral country * * * prior to his induction into the land or naval forces of the United States files with his local board an original and one copy of an Application by Alien for Relief from Military Service (Form 301) * * * he shall be placed in Class IV-C; * * *.

APPENDIX B

RULING FROM THE BENCH BY THE HON. ALEXANDER HOLTZOFF, JUDGE, ON MOTION FOR DECLARATORY JUDGMENT

Washington, D.C., Thursday, May 14, 1953

Robert I. Thiel, Official Reporter

The Court: The Court has had considerable hesitancy and reluctance in attempting to determine the merits of this litigation, because subsequent to the time when it was instituted the Supreme Court held that an action for a declaratory judgment will not lie to determine the validity of an order of deportation.

The Court upon reflection, however, determined to keep this case and decide it on the merits in view of the fact that after it was dismissed in this Court it was remanded by the Court of Appeals for trial. Even though that order of remand was made on consent, nevertheless, the Court is inclined to view that it is binding on this Court and constitutes the law of the case.

This brings us to the real question at issue. The plaintiff made a claim for exemption from Selective Service as a citizen of a country alleged to be neutral in World War II, namely, Denmark. The Selective Service Act permitted citizens of neutral countries to make a claim for deferment on the ground that they were such citizens. The Selective Service Act provided, however, that a person who makes such a claim ceases to be eligible for naturalization.

The plaintiff's deportation has been ordered on the ground that by making the foregoing claim he became ineligible to citizenship and thereby ineligible to remain in the United States as a permanent resident.

It is claimed by the plaintiff that Denmark was not in fact a neutral country but for some purposes it was an enemy country and for others an allied and associated power, thus being in a somewhat anomalous state.

The Government claims that the Court may not review this point in view of the fact that it was not raised before the Immigration authorities.

The pretrial memorandum clearly indicates, however, that this issue was raised by the plaintiff at pretrial, that it was met by the defendant at pretrial and that no contention was made that the issue was not available or open. The Court is bound by the pretrial order, and therefore, the conclusion necessarily follows that this issue is open for decision.

Ordinarily, the question whether a foreign power is a neutral or not is a political question to be determined by the President of the United States or the Secretary of State. In this instance, however, the State Department has failed to make a determination of this question. In fact, the conclusion seem inescapable that the State Department carefully and deliberately refrained from making an open declaration on the question whether Denmark should be or should not be regarded as a neutral. For the purposes of the Trading-With-the-Enemy Act Denmark was regarded as an enemy country.

Since the Executive Branch of the Government has not made a formal declaration or a formal decision on this question, which may be deemed to be a political one, the Court has to decide it as a question of fact, and it must do so as it would determine any other fact presented to it for decision.

The parties have stipulated the evidentiary facts on the basis of which the Court may make its decision. The Court reaches the conclusion, on the basis of the stipulated facts, that Denmark was not a neutral country. If it was not a neutral country, it necessarily follows that the provision of the Selective Service Act on which the Government relies for depriving the plaintiff of eligibility for citizenship is not applicable. It may well have been erroneous for the Selective Service authorities to grant the plaintiff's claim for exemption as a citizen of a neutral country, because he was a citizen of a country that was not neutral. But, be that as it may, the drastic penalty of loss of eligibility for citizenship may not attach to the plaintiff's claim of citizenship in a neutral country and to the grant of that claim of exemption, because in fact Denmark was not a neutral country.

In view of these circumstances, the Court will render judgment in favor of the plaintiff. You may present proposed findings of fact and conclusions of law, and proposed judgment.

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UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11928

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, APPELLANT,

v.

EINAR RASMUSSEN, APPELLEE.

Appeal from the United States District Court for the District of Columbia

Decided June 14, 1956

Mr. Harold H. Greene, Assistant United States Attorney, for appellant. *Messrs. Leo A. Rover*, United States Attorney at the time of argument, and *Lewis Carroll*, Assistant United States Attorney, were on the brief for appellant. *Mr. William J. Peck*, Assistant United States Attorney at the time record was filed, also entered an appearance for appellant.

Mr. David Carliner for appellee. *Messrs. Jack Wasserman* and *Irving Tranen* were on the brief for appellee.

Before EDGERTON, Chief Judge, and FAHY and WASHINGTON, Circuit Judges.

WASHINGTON, *Circuit Judge:* Plaintiff-appellee obtained a declaratory judgment in the District Court that he "is not ineligible for citizenship upon the ground that he claimed exemption [from liability for service under the Selective Training and Service Act of 1940] as a neutral alien," and accordingly is not subject to deportation upon the ground that he entered the United States illegally.

When we previously heard this case, we were of the opinion that under *Heikkila* v. *Barber*, 345 U.S. 229 (1953), the District Court was without jurisdiction to review a deportation order other than in a habeas corpus proceeding. *Brownell* v. *Rasmussen*, 95 U.S. App. D.C. 260, 221 F.2d 541 (1955). In *Rasmussen* v. *Brownell*, 350 U.S. 806 (1955), the Supreme Court reversed without opinion, and remanded the case to us for consideration on the merits, to which we now proceed.

Appellee, an alien residing in this country, in 1943 filed an application for relief from liability from the draft in accordance with Section 3(a) of the Selective Training and Service Act of 1940, 54 STAT. 885 (1940), on the ground that he was a citizen of a neutral nation, Denmark. He was given deferred status. A few months later he offered himself for induction, but was rejected as physically unfit. The question before us is whether by his request for relief appellee became debarred from becoming a citizen of the United States, since if he did become debarred he is subject to deportation.[1] Appellee says that he is not debarred, for the reasons that (1) he was not entitled to relief from the draft because (so he contends) Denmark was not neutral at the time of his application, and (2) he was not in fact relieved from liability because of his application. We think appellee's contentions cannot be sustained.

Section 3(a) says in pertinent part that "every . . . male . . . person residing in the United States . . . shall be liable for training and service . . . Provided, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if . . . he has made

[1] Appellee claims that since he was authorized to make voluntary departure in 1944, prior to the Act of October 29, 1945, 59 STAT. 551, that Act should not apply to his re-entry in 1946. But Section 13(c) of the Immigration Act of 1924, 43 STAT. 153, which the Act of October 29, 1945 amended, specifically makes admission to the United States the thing barred to those ineligible to citizenship, not voluntary departure, so that the 1945 Act clearly is applicable to the 1946 re-entry. Cases under the Immigration and Nationality Act of 1952, 8 U.S.C. 1101 et seq. are inapposite, because the 1945 Act contains no counterpart to the Section 405 "savings clause" of the 1952 Act.

application to be relieved from such liability . . . but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States."

Since appellee was admittedly a male alien "residing" in this country, he was "liable for service" whether he was a citizen of an allied nation, a neutral nation, or an enemy nation, and remained liable whether or not he was called, or deferred for some reason unrelated to alienage.[2] He asked to be relieved from liability on the ground that he was a citizen or subject of a neutral country. This seems all that Section 3(a) requires: the "bar only comes into existence when an alien resident liable for service asks to be relieved." *McGrath* v. *Kristensen*, *supra* note 2, 340 U.S. at 172 (emphasis added). And as this court said in *Machado* v. *McGrath*, 90 U.S. App. D.C. 70, 74, 193 F. 2d 706, 710 (1951), cert. denied, 342 U.S. 948 (1952):

> "Citizens and subjects of a neutral country who apply for relief prior to induction need not serve in our armed services. But any person who asks for this relief is thereafter debarred from becoming a citizen of the

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[2] In McGrath v. Kristensen, 340 U.S. 162 (1950), the Supreme Court said, at page 172:

> "If Kristensen was not 'residing' at the time of his application for relief, he could not then have had 'such liability' for service. If there was no 'liability' for service, the disqualification for citizenship under the penalty clause could not arise because the applicant had not made the 'application' referred to in the statute as 'such application.' 'Such application' refers to an application to be relieved from 'such liability.' As there was no 'liability' for service, his act in applying for relief from a nonexistent duty could not create the bar against naturalization. By the terms of the statute, that bar only comes into existence when an alien resident liable for service asks to be relieved."

Unlike Kristensen, who was not liable for service under Section 3(a) because he was not a resident, appellee was liable. Under the Act, one may be liable though not called, or deferred or exempted. See, e.g., Section 4(a), 54 STAT. 887:

> "SEC. 4. (a) The selection of men for training and service under section 3 (other than those who are voluntarily inducted pursuant to this Act) shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the men who are liable for such training and service and who at the time of selection are registered and classified but not deferred or exempted. . . ."

United States. Congress nowhere provided that the subsequent entrance of a neutral into the war, either with or without reclassification of its aliens, would remove the bar to citizenship previously incurred."

There is thus basis for concluding that a resident alien who applies for relief on the ground of neutral nationality is barred by the application, regardless of whether the country in question is in fact neutral. But we need not reach that point. We are convinced that in the instant case the ruling of the Director of Selective Service holding Denmark to be a neutral country for purposes of Section 3(a) is controlling, and cannot be collaterally attacked. The status of a foreign country for our domestic purposes is a political matter peculiarly within the control of the executive branch of the government. While it is true that determinations on foreign policy matters are normally delegated to the Secretary of State rather than other members of the executive branch, this is not necessarily so. Here the Director acted under the supervision of the President, who was of course charged with military as well as foreign policy responsibilities. In the absence of some repudiation by the President of the Director's determination regarding the status of Denmark and its nationals, we do not think the courts should entertain a collateral attack upon it. *Compare Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948).

We turn to appellee's contention that it is not his request for relief but whether in fact he was relieved because of neutral alienage, that is determinative. If appellee had not been relieved at all, but had in fact been impressed into service, there might be some weight to his argument. But here it is clear that appellant was in fact deferred shortly after making his application for relief. His complaint in the District Court contains no allegation that the deferment was based on anything other than his application.[3] The

[3] The complaint says that the plaintiff made the application for relief as a neutral, and adds "Plaintiff was thereafter classified IV-A." The Government's answer admits this allegation. Under the Selective Service regulations then in force, the "IV-A" classification was for persons to

case was not tried on any such basis, and it is only in this court that the suggestion is made that the deferment might have been based on something other than his application as a neutral. It is in fact no more than a suggestion—there is no definite offer to show that the deferment was actually based on another ground. Under the circumstances, we do not think we would be justified in remanding the case for a determination by the trial court of the ground of deferment.[4]

Appellee also contends that his application was the result of mistake. He said he believed, partly at least because of misinformation supplied by his draft board, that induction into the armed forces would not facilitate or authorize naturalization, and therefore he chose to seek relief from liability. But this is not the sort of mistake as to the nature of the application for relief from liability or its immediate consequences such as existed in *Moser* v. *United States*, 341 U.S. 41 (1951), or *Machado* v. *McGrath*, *supra*. Instead, as in *Mannerfrid* v. *United States*, 200 F. 2d 730, 733 (2d Cir. 1952), cert. denied, 345 U.S. 918 (1953), this is a case in which the alien, "although he knows that the claim [for relief from liability for service] will forfeit his right . . . is induced to make it because he is mistaken as to what will be the consequences of not making it. We concede that that would be no more than a further step

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old to be called for service (over 45). See 7 FED.REG. 9607 (Nov. 20, 1942). The proper classification for aliens claiming relief as neutrals was "IV-C." But the complaint goes on to say that after plaintiff requested induction his "claim for exemption was no longer honored." This rather strongly implies that prior thereto the "claim"—evidently the application for relief—had been honored.

[4] The writer of this opinion would go further, and say that appellee is barred even though it is shown that his draft board purported to defer him for some reason other than his proffered application for relief as a neutral alien. Appellee should not now be allowed to disavow the legal consequences of his application. Congress intended that applications for relief duly filed by nationals of neutral countries should be honored: if any such application had not been honored, judicial intervention would no doubt have been available. A man deferred for neutral alienage, furthermore, had a much more secure status than one deferred for age, physical reasons, parenthood, or the like.

of the lenity that the Court exercised in *Moser* v. *United States*, supra, and that the difference is one of degree; but that is so often the determining factor in situations of this kind, that we need not support its propriety if the difference in degree be wide enough. We can say no more than that we do not believe that Congress would have tolerated the necessary laxity in this instance." We agree with the Second Circuit's conclusion concerning this issue. And our decision in *Machado* v. *McGrath*, *supra*, also makes it clear that appellee's action in offering himself for induction while the war was still going on does not overcome the effect of his earlier application for relief.

Accordingly, the judgment of the District Court must be reversed with instructions to enter judgment for appellant.

So ordered.

JUDGMENT—(Filed June 14, 1956)

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said District Court with instructions to enter judgment for appellant.

Dated: June 14, 1956.

Per Circuit Judge Washington.